

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
A SUBSTANTIAL DEVELOPMENT PERMIT)
ISSUED BY ISLAND COUNTY TO)
ALBERT P. MACDONALD,)

ALBERT P. MACDONALD and)
DENISE A. MACDONALD,)

Appellants,)

v.)

ISLAND COUNTY,)

Respondent.)

SHB No. 80-29

FINAL FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER

This matter, the Request for Review of a shoreline substantial development permit issued by Island County, came before the Shorelines Hearings Board, Nat Washington, chairman, A. M. O'Meara, Jack Shero, Rodney Kerslake, and David Akana (presiding), at a hearing in Seattle on October 10, 1980.

Appellants appeared and were represented by their attorney, R. Patrick McGreevy; respondent was represented by Alan R. Hancock,

1 deputy prosecuting attorney.

2 The initial question submitted to the Board for decision is
3 whether appellants applied for the shoreline substantial development
4 permit in question. In the course of the hearing, evidence unrelated
5 to that precise issue but relevant to other issues was submitted by
6 both parties, and upon which certain findings and conclusions are
7 based.

8 Having heard the testimony, having examined the exhibits, and
9 having considered the contentions of the parties, the Board makes these

10 FINDINGS OF FACT

11 I

12 In July of 1976 appellants purchased two waterfront lots (Nos. 7
13 and 8) in the plat of First Addition to Wilkes Gary Heights on Camano
14 Island in Island County. The lots abut Saratoga Passage. While
15 sharing a generally southwesterly view of the water, the waterward
16 boundary of the two lots come to a point and are about 12 degrees from
17 lying in a straight line. Appellants have some ownership interest to
18 the tidelands in front of the lots. Lot 7 has 116 waterfront feet;
19 lot 8 has 100 waterfront feet. Both lots, though irregular in shape,
20 extend upland as much as 167 feet.

21 II

22 As a condition of sale, appellants received the first page of a
23 document entitled "Exemption from Shoreline Management Act Substantial
24 Development Requirement." The document exempted the "construction of
25 protective bulkheading common to a single-family residence," upon lots
26 7 and 8. A site plan and vicinity map were included as a necessary
27

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1 part of the exemption request which pages were not received by
2 appellant at the closing of the sale in 1976. The site plan depicts a
3 proposed bulkhead lying in a straight line and connecting to existing
4 bulkheads on lots 6 and 9. The exemption request was submitted in
5 appellants' name by a contractor named Watkins. Appellants deny that
6 Watkins had authority to submit the request for them.

7 III

8 In 1976, appellants contracted with Watkins to install two septic
9 systems, a road and bulkhead for \$5000. Except for the septic system,
10 the contract was not completed by Watkins, however. Appellants
11 intended the two-lot development for their retirement home and for
12 keeping their options open.

IV

14 On April 4, 1979, appellants contacted the Island County Planning
15 Department seeking "instructions" to put the bulkhead in. After
16 reviewing the file, the planner orally granted appellants an
17 "extension" of the 1976 exemption for the bulkhead. Appellants were
18 also told that a building permit would be needed. A written
19 extension, for a period of one year dated April 6, 1979, was sent to
20 appellants. Appellants were instructed that "the proposed bulkhead is
21 to be constructed in line with the existing bulkheads on the adjoining
22 properties."

23 V

24 The bulkhead was started in October of 1979 by a different
25 contractor and completed at a cost of about \$7500. The project

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1 included placing fill behind the bulkhead and grading the two lots.
2 The bulkhead, as constructed, extends waterward beyond the "ordinary
3 high water mark" as that term is known and defined in RCW
4 90.58.030(2)(b). The bulkhead does not conform to the site plan as
5 submitted in 1976 by Watkins. As constructed, the bulkhead extends to
6 a point on the tidelands about 30 feet beyond a line drawn between
7 adjacent, existing bulkheads.

8 An access road from a country road to the two lots was also
9 started by appellants within 200 feet of the shoreline. The
10 construction of the road involved removal of vegetation, trees, and a
11 portion of an upland bank, and placing the fill elsewhere on the
12 site. If there was an existing road to the two lots prior to the
13 construction of the present road, it was not easily tranversed, even
14 by foot over the uneven terrain and through the vegetation and trees.

15 VI

16 On October 19, 1979, respondent's planning department sent
17 appellants a shoreline substantial development permit application
18 along with a memorandum requesting that no further roadwork or grading
19 take place. On October 31, 1979, appellants returned the
20 environmental checklist along with a letter stating that the property
21 was purchased to provide them with a retirement home. An exemption
22 from the Shoreline Management Act (SMA) was claimed and requested for
23 all the existing and proposed developments.

24 VII

25 On November 15, 1979, respondent issued a stop work order directed
26

1 to the construction on lots 7 and 8 because the road, bulkhead, and
2 grading was contended to be in violation of the SMA. After the notice
3 was issued, drainlines at the toe of the slope and some reseeding was
4 done to prevent erosion.

5 VIII

6 On February 6, 1980, appellants submitted an application for a
7 substantial development permit without the signature page.¹ A
8 letter explained that appellant completed the application for the
9 purpose of determining whether this is a "substantial development." The
10 proposed development as set forth in item nine of the application was
11 a "single-family residence, two story." The described current
12 improvements on the vacant lot included bulkhead, road, septic system,
13 and water line. The unsigned application form was received by the
14 County on February 8, 1980. On his own initiative, respondent's
15 planner, by interlineation, expanded the description of the proposed
16 development set forth in item nine to include grading the property and
17 constructing a bulkhead, road and drainage. On February 8, the County
18 requested the payment of the required \$25.00 application fee.
19 Appellants promptly paid the fee.

20 IX

21 On February 7, 1980, prior to receiving appellants unsigned
22 application, respondent's planner informed appellants by letter that a
23 shoreline substantial development permit was required for the grading,
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25 1. WAC 173-14-110 does not specifically require that a shoreline
substantial development permit be signed.

1 roadwork, and bulkheading which had already occurred on the two lots.
2 The planner also requested appellant to submit an application for such
3 a permit.

4 X

5 At a February 27, 1980 pre-hearing conference attended by
6 appellants and representatives from the county, appellants again
7 claimed an exemption for all the developments. The county
8 representatives told appellant that the developments were not exempt
9 and interpreted the claim as being an application under protest.

10 XI

11 As a result of the February 27 meeting appellants learned that
12 they were required to obtain, and did apply for, a permit to gain
13 access to the county road right of way for lots 7 and 8. An access
14 permit was later issued conditioned upon stabilizing an embankment
15 which appellants had earlier cut away in constructing the access road.

16 XII

17 On March 21, 1980, the bulkhead and fill were inspected by a
18 representative of the U.S. Army Corps of Engineers. The investigation
19 disclosed a bulkhead of vertical logs placed side by side located 15
20 feet waterward of the line of mean higher high water. The bulkhead
21 was built in two segments separated by a 12 foot gap in the center.
22 Approximately 340 cubic yards of upland material was used as backfill.

23 By letter dated April 21, 1980, appellants were informed that the
24 bulkhead and fill were considered to be in violation of various
25 provisions of federal law.

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XIII

At the April 22, 1980 Planning Commission meeting, appellants' proposed developments were discussed. Appellants again claimed an exemption from the SMA for their activities. The Planning Commission noted the claim and considered the application. A permit was recommended for approval subject to five conditions:

1. That the bulkhead be constructed in line with existing bulkheads on adjoining properties but not extend beyond mean higher high water (11.1 feet) in between. The 11.1 foot mark will be staked by the County Planning Department.

2. That bank stabilization be provided adjacent to the County road as soon as possible in accordance with requirements of the County Engineering Department.

3. That adequate drainage facilities to control surface water runoff be provided subject to the approval of the County Planning Department.

4. That all soil areas not to be used as roadways or building sites be revegetated before November, 1980, to control erosion.

5. That the subject lots be considered one lot for building purposes in accordance with Section 6.(2) of the Island County Zoning Ordinance.

XIV

The matter came before the Island County Board of County Commissioners on July 7, 1980. Appellants, through counsel, again asserted an exemption from the SMA for their activities, underscored that the permit application had not been signed and that appellants did not formally apply for a permit. The matter was continued to July 21, at which meeting the Planning Commission recommendation was accepted with an added condition relating to the starting and completion dates for construction.

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1 XV

2 Appellants did not intend to make application for a substantial
3 development permit on February 6, 1980. However, appellants
4 subsequent acts with respect to that February 6 document would lead a
5 reasonable person in the planning department to believe that
6 appellants did acquiesce in the treatment of the document as an
7 application for a substantial development permit.

8 XVI

9 On the application form submitted by appellants on February 6, the
10 proposed development was described as a "single-family residence, two
11 story" on lot 8. Appellants received a permit to undertake grading,
12 roadwork, and bulkheading on lots 7 and 8. The developments allowed
13 in the permit were not requested by appellant.

14 XVII

15 Appellants intended that the grading, roadwork, and bulkheading
16 conducted on the two lots stand or fall on their interpretation of the
17 exemption provisions of the SMA. A reasonable person in appellants
18 position would know or should have known that the county regarded the
19 grading, roadwork and bulkheading as substantial development under the
20 SMA no later than after the receipt of the letter dated February 7,
21 1980, and as early as after the receipt of the application forms in
22 October of 1979.

23 XVIII

24 Any Conclusion of Law which should be deemed a Finding of Fact is
25 hereby adopted as such.

26 From these Findings the Board comes to the following
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1 CONCLUSIONS OF LAW

2 I

3 Appellants' position with respect to the 1976 exemption is
4 inconsistent. On one hand they seek to attain the benefits from the
5 exemption which were secured on their behalf by an agent whose
6 authority to do so they have since repudiated. On the other hand they
7 refuse to recognize that the exemption documents included a drawing
8 showing a proposed bulkhead in a straight line between adjacent
9 existing bulkheads. The county's letter of April 6, 1979, does not
10 contradict the alignment shown in drawing submitted.

11 We conclude that appellants ratified the act of Watkins when they
12 chose to use the exemption secured by him on their behalf. If
13 appellants did not remember seeing the drawing, the fault does not lie
14 with the county which did rely on the drawings and representations
15 made to it in the 1976 application.

16 II

17 The 230 feet of bulkhead and 340 cubic yards of fill constructed
18 on the shorelines and waterward of the ordinary high water mark
19 creating land on two lots at a cost of \$7500 do not, in our view, fall
20 within the exemptions of RCW 90.58.030(3)(e). Similarly, access to
21 the lots along the path appellants have cleared does not appear to
22 fall within normal maintenance or repair of existing developments
23 recognized by RCW 90.58.030(3)(e). No significant access existed at
24 the site until appellants decided to create it. Appellants'
25 substantial developments on two lots each with a separate septic

1 system, are not exempt from the permit requirements simply because
2 appellants intend to use one of the lots for their retirement house.²

3 II

4 Appellants insist that they have not applied for a permit and we
5 conclude that they have not applied for the permit issued. Appellants
6 clearly intend to assert exemptions to the SMA for their installed
7 developments despite an opposing county position. The enforcement
8 aspects under the SMA found in this case is better left to the
9 superior court, as appellants suggest, rather than by devising an
10 enforcement order characterized as a permit.³ Accordingly, the
11 permit should be
12 vacated as requested by appellants.

13 IV

14 Any Finding of Fact which should be deemed a Conclusion of Law is
15 hereby adopted as such.

16 From these Conclusions the Board enters this
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21 2. Department of Ecology v. Clallam County, SHB No. 159. See
22 English Bay v. Island County, 89 Wn 2d 16 (1977). See generally,
23 Department of Ecology v. Pacesetter Construction Co., 89 Wn 2d 203
24 (1977).

25 3. Even if there is no "substantial" development, "developments"
26 must be consistent with the policy of the SMA and the master program.
27 RCW 90.58.140(1).

ORDER


The substantial development permit SDP No. 0580 issued to Albert and Denise MacDonald by Island County is vacated.

DONE at Lacey, Washington, this 24th day of October, 1980.

SHORELINES HEARINGS BOARD


NAT W. WASHINGTON, Chairman


DAVID AKANA, Member


JACK SHERO, Member


A. M. O'MEARA, Member


RODNEY KERSLAKE, Member

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